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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOB EDDY, etc., et al.,

Petitioners,

v.

CAROLYN N. HESS, etc.,

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether, in an action brought under 42 U.S.C. § 1983, where a state law statutory wrongful death right of action is made applicable to the litigation by 42 U.S.C § 1988, the "relation back" rule contained in Rule 17 (a), F.R.C.P., can be used to toll a limitation period contained in the statute creating the right of action where such limitation period is a substantive part of the statutory right of action and where such tolling would not be permitted under state law?

PARTIES

In addition to the names contained in caption, appellees-defendants in the case below included James Record, Charles Stone, Robert Spears and Woodrow Balch, individually and as members of the Madison County Commission of Madison County, Alabama (all petitioners here) as well as Robert Britton, Commissioner of the Alabama State Board of Corrections.

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OPINIONS BELOW

1. The opinion of the United States District Court for the Northern District of Alabama, holding that the action below was subject to dismissal because the plaintiff did not qualify as administratrix of the estate of the deceased prior to bringing the action and prior to the expiration of the two year time period contained in Section 6-5-410, Code of Alabama 1975, is reproduced as Appendix B hereto, pp. 33-45.

2. The opinion of the United States Court of Appeals for the Eleventh Circuit, reversing the District Court's decision, is reported as Hess vs. Eddy, 689 F.2d 977 (11th Cir. 1982), and is reproduced as Appendix C hereto, pp. 46-60.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Eleventh Circuit was issued on October 21, 1982. See Appendices C and D pp. 46-62. The Petition for Rehearing and suggestion for Rehearing En Banc of Petitioners Eddy, Record, Spears, Stone and Balch was denied on December 10, 1982. See Appendix E, pp. 63-64.

This court has jurisdiction pursant to 28 U. S. C. Section 1254 (1), this being a petition for writ of certiorari seeking to review a decision of a Court of Appeals in a civil case.

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

1. Title 42 U.S.C. Section 1988 provides, in pertinent part:

> The jurisdiction in civil and criminal matters conferred on the District Courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States and their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the state wherein the court having jurisdication of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . .

2. Section 6-5-410, Code of Alabama 1975, which provides in pertinent part:

> (a) A personal representative may commence an action and recover such damages as the jury may assess in a court of competent jurisdiction within the state of Alabama and not elsewhere, for the wrongful act, omission or negligence of any person, persons, or corporation, his or their servant or agents, whereby the death of his testator or intestate was caused, provided the testator or intestate could have commenced an action for such wrongful act, omission or negligence had it not caused death.
>
> * * *
>
> (d) Such action must be commenced within two years from and after the death of the testator or intestate.

3. Rule 17(a), Federal Rules of Civil Procedure which provides in pertinent part:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by or joinder or substitution of, the real party and interest; and such rat-

ification, joinder or subsitution shall have the same effect as if the action had been commenced in the name of the real party and interest.

4. Title 28 U.S.C. Section 2072 provides, in pertinent part:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeal of the United States in civil actions . . .
>
> Such rules shall not abridge, enlarge or modify any substantive right . . .

STATEMENT OF THE CASE

The Facts

On October 30, 1980 an action was commenced in the United States District Court for the Northern District of Alabama seeking recovery under 42 U.S.C. Section 1983 for an alleged deprivation of civil rights resulting in death. (R. 1)[2] The complaint alleged that David Milano had been a prisoner in the Madison County Jail on November 2, 1978 and was on that date killed by another inmate. The complaint alleged that the named defendants failed to provide adequate security for Milano while he was confined in the jail and that their failure to do so resulted in his death. (R. 2-3) Named as defendants in the action were the Sheriff of Madison County, Alabama, the members of the Madison County

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[2]References to (R.) are to the record on appeal in the Eleventh Circuit Court of Appeals.

Commission and various fictitious defendants who are alleged to be "members of the Board of Corrections of the State of Alabama" and "the parties who were responsible for the prisoners in the Madison County Jail on the occasion complained of."[3]

The complaint alleged that the plaintiff was the administratrix of Milano's estate at the time of the commencement of the action (R. 1). The allegation was untrue. On October 30, 1980 the plaintiff had filed a petition in the Probate Court of Madison County, Alabama seeking letters of administration in regard to the estate of David Milano (R. 9, 34). The next day, October 31, 1980, plaintiff filed her complaint in the United States District Court for the

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[3]On January 14, 1981, plaintiff amended her complaint to add as a defendant Robert Britton, Commissioner of the Alabama State Board of Corrections.

Northern District of Alabama. (R. 1) However, prior to filing her complaint, plaintiff did not take the necessary steps required under Alabama law to become appointed as administratrix of Milano's estate (R. 9, 34). On November 2, 1980, when the two year statutory time period under Alabama law for wrongful death actions expired,[4] plaintiff still had not been appointed administratrix of Milano's estate (R. 9, 34). It was not until February 12, 1981, more than three months after her action had been commenced, that plaintiff took the necessary steps under Alabama law to become appointed as administratrix of Milano's estate (R. 75).

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[4]See Section 6-5-410(d) Code of Alabama 1975.

The District Court Proceedings

All defendants in the District Court moved for summary judgment on the grounds that the plaintiff's failure to bring the action as administratrix of the estate of David Milano within two years of his death barred the action as a matter of law. (R. 8-16, 32-33) On June 29, 1981, United States District Judge Robert B. Propst granted the motions for summary judgment and dismissed the complaint with prejudice. See Appendix A hereto.

Judge Propst held that under 42 U.S.C. Section 1988 the remedy applicable to the case was that provided by the Alabama statutory wrongful death action, Section 6-5-410, Code of Alabama 1975. In an opinion accompanying his order of dismissal, (see Appendix B hereto), Judge Propst observed that Section 6-5-410 required that the action must have

been commenced by the "personal representative"[5] of the deceased "within two years from and after the death of the testator or intestate." Under Alabama law the two year time limitation contained in Section 6-5-410 is a part of the substantive right of action and is not a procedural statute of limitations, Downtown Nursing Home, Inc. vs. Pool, 375 So.2d 465 (Ala. 1979). As a consequence, the plaintiff's failure to qualify as administratrix rendered her suit, when brought, to be "a nullity", Downtown Nursing Home, Inc. vs. Pool, supra, and, upon the expiration of the two year period without the appointment of the plaintiff as administratrix, her ability to maintain the action expired. Ibid. In concluding that the action was due to be dismissed, Judge Propst held that:

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[5]The term "personal representative" as used in § 6-5-410 to describe the person who may bring a wrongful death action thereunder means only the duly appointed executor or administrator of the estate of a deceased, Hatas vs. Parton, 278 Ala. 65, 175 So.2d 759 (1965).

(1) Alabama's policy of restricting certain survivorship rights to personal representatives who bring actions within two years is not unreasonable;

(2) Alabama law governs in determining whether a person or representative has been appointed;

(3) Claimants who sue in Alabama for wrongful death under Section 1983 for injury to their own interests (if such a claim is allowable) must commence suit within one year;[6] and

(4) [The] court can borrow the applicable statutes of limitations under Section 6-5-410, Code of Alabama 1975 only if the action is brought within two years by a duly appointed personal representative.

On July 29, 1981 plaintiff filed notice of appeal to the United States Court of Appeals for the Eleventh Circuit. (R. p. 90).

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[6]Plaintiff had combined with her wrongful death action certain individual claims which were dismissed by the trial court. Plaintiff did not appeal from the dismissal of her individual claims. See Appendix C hereto, p.49.

The Court of Appeals Proceedings

On October 21, 1981 the United States Court of Appeals for the Eleventh Circuit entered a judgment reversing the district court's judgment. See, Appendix D, pp. 61-62. That judgment was accompanied by an opinion which is published as Hess vs. Eddy, 689 F.2d 977 (11th Cir. 1982), and is reproduced as Appendix C to this petition, pp.46 -62. The Court of Appeals concluded that the F.R.C.P. Rule 17(a) "relation back" doctrine was applicable to the action and held that the tardy qualification by the plaintiff as administratrix of Milano's estate related back to the filing of the complaint.

A Petition for Rehearing with a Suggestion for Rehearing En Banc filed by all parties was denied by the Court of Appeals on December 10, 1982. See Appendix E. hereto pp. 63-64.

REASONS FOR GRANTING THE WRIT

This Case Involves a Conflict Between 42 U.S.C. § 1988 and the Federal Rules of Civil Procedure

This case presents an important issue concerning the conduct of actions in federal court brought under the Civil Rights Acts. It is a case which squarely presents to the Court the question of differing results obtaining in such actions from the application of state law pursuant to 42 U.S.C. § 1988 and the application of the Federal Rules of Civil Procedure.

I. 42 U.S.C. § 1988 Requires That State Apply.

This action was brought in federal court in Alabama under 42 U.S.C. § 1983 seeking recovery for the alleged deprivation of the the civil rights of a decedent. Since federal law is "deficient" with regard to such matters

as whether and in what form such actions survive[7], 42 U.S.C. § 1988 requires that "the common law" of Alabama "as modified and changed by the constitution and statutes" of Alabama "be extended to and shall govern . . . the trial and disposition of the cause." Robertson vs. Wegmann, 436 U.S. 584 (1978). Alabama law provides that such an action survives in the form of the Alabama statutory wrongful death action provided in § 6-5-410, Code of Alabama 1975. Pollard vs. United States, 384 F.Supp. 304 (M.D. Ala. 1974). In Pollard, a three judge panel decision involving the Tuskeegee syphilis cases, then District Judge Frank M. Johnson, Jr., stated:

> Since there is no express federal remedy for wrongful death under the Civil Rights Statutes (42 U.S.C. § 1981, 1983 and 1985),

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[7] Robertson vs. Wegmann, 436 U.S. 584, 589 (1978); Moor vs. County of Alameda, 411 U.S. 693, 702 (1973).

> the common and statutory law of the state of Alabama must be looked to for a suitable remedy not inconsistent with the Constitution and laws of the United States. 42 U.S.C. § 1988. An action against . . . state defendants, for the wrongful death of plaintiffs' decedents resulting from violation of the Civil Rights Statutes gives rise, by virtue of Alabama's wrongful death statute to federally protected enforceable claims for damages by their personal representatives. 384 F.Supp. at 306.

The Court of Appeals correctly recognized that application of § 6-5-410 to this action pursuant to § 1988 required that suit be brought only by the "personal representative" of the decedent and that it be brought within the two year period set forth in § 6-5-410(d). (Appendix C, pp. 52 - 53 . However, the Court of Appeals' application of § 6-5-410 stopped short at that point. The Court of Appeals held that even though the plaintiff who commenced this action was not the personal representative of the decedent either at the

time she commenced the action or became such at any time within the two year period contained in § 6-5-410(d), her subsequent appointment as administratrix some three months later "related back" to the initial filing of the complaint under Rule 17(a), F.R.C.P. Appendix C at pp. 53 - 60 .

The Court of Appeals in this case has allowed, through application of Rule 17(a), the initial filing of the plaintiff's complaint to toll the limitation period of § 6-5-410(d). However, in doing so, the Court of Appeals committed the same error condemned by this Court in Board of Regents vs. Tomanio, 446 U.S. 478 (1980). The Court of Appeals, like the Second Circuit in Tomanio, permitted the tolling of a state limitation period in an action brought under 42 U.S.C. § 1983 by resort to federal law when no such tolling is permitted under state law.

In Tomanio this Court squarely held that in actions brought under 42 U.S.C. § 1983 not only did state law limitation periods apply under § 1988 but also state tolling rules must be applied as well, 446 U.S. at 485-86. The Court in Tomanio, quoting Johnson vs.Railway Express Agency, Inc., 421 U.S. 454 (1975), made it clear that the entirety of the applicable state law relating to the limitation period is to be applied pursuant to § 1988 in actions brought under § 1983. The Court stated:

> Any period of limitation . . . is understood only in the context of the various circumstances that suspend it from running against a particular cause of action. Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival,

> and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the state's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim. 446 U.S. at 485-86

Alabama law is clear that there can be no tolling of the two year period contained in § 6-5-410(d) pending the appointment of the personal representative of the estate. Downtown Nursing Home, Inc. vs. Pool, 375 So.2d 465 (1979), cert. denied, 445 U.S. 930 (1980). The two year period contained in § 6-5-410(d) is not, as perceived by the Court of Appeals, (Appendix C at p. 52 , n.5.), a statute of limitations. Instead, under Alabama law the two year period contained in § 6-5-410 is a part of the substantive right of action itself and is not to be treated as a statute of limitations. Downtown Nursing Home, Inc. vs. Pool, supra. The two year limitation period in § 6-5-410 is a limitation on the liability

itself and not merely on the exercise of the remedy. Nicholson vs. Lockwood Greene Engineers, Inc., 278 Ala. 497, 179 So.2d 76 (1965); Parker vs. Fies & Son, 243 Ala. 348, 10 So.2d 13 (1942); Louisville and N.R.R. Co., vs. Chamblee, 171 Ala. 188, 54 So. 681 (1911). After two years the right of action simply expires, Nicholson vs. Lockwood Greene Engineers, Inc., supra. at 78-79. As a consequence, if a wrongful death action is commenced in Alabama prior to the expiration of the two year period following the death of the decedent by one who is not the "personal representative" of the estate of the decedent, subsequent appointment of the plaintiff as the personal representative following expiration of the two period period cannot "relate back" to the commencement of the action. Downtown Nursing Home, Inc. vs. Pool, supra. at 466. Under Alabama law, such a suit is a "nullity" when brought and is subject to dismissal upon the

expiration of the two year period. Ibid.

The Court of Appeals in this case in allowing the filing of the complaint to toll the limitation period contained in § 6-5-410(d), pending appointment of the personal representative has failed to heed the admonition of this Court in Tomanio that:

> In § 1988 actions . . . a state statute of limitations and the coordinate tolling rules are more than a technical obstacle to be circumvented if possible. In most cases, they are binding rules of law. In § 1988, Congress "quite clearly instructs [federal courts] to refer to state statutes" when federal law provides no rule of decision for actions brought under § 1983. 446 U.S. at 484 .

As a consequence, the Eleventh Circuit erred in not strictly applying the two year limitation period contained in the Alabama statutory wrongful death action. This Court should grant certiorari and reverse.

II. Rule 17(a) Cannot Displace A Substantive Rule of State Law

Two other reasons exist why the Court of Appeals erred in holding that the "relation back" doctrine of Rule 17(a) controls over § 1988's clear directive to apply to state law. The two reasons are to some extent interrelated. They are: (1) The legislative history of Rule 17(a) indicates that it was not intended to apply in circumstances where it would displace a substantive rule of state law, and (b) if Rule 17(a) were to permit the displacement of a substantive rule of state law, such would place Rule 17(a) beyond the scope of the Rules Enabling Act, 28 U.S.C. § 2072.

As discussed previously, supra, pp. 18 - 20 , the specific rule of state law at issue here is not a mere procedural rule of Alabama law. Rather the two year period of limitations contained in § 6-5-410(d) is an integral part of the Alabama statutory wrongful death right

of action which has been transplanted to federal court for enforcement. The legislative history of Rule 17(a) strongly suggests that Rule 17(a)'s "relation back" doctrine was not intended to have application in those circumstances where it would result in the displacement of a substantive rule of state law.

As the Court of Appeals correctly noted, the "relation back" rule set forth in the 1966 amendments to Rule 17(a) is a codification of the "relation back" rule of Levinson vs. Deupree, 345 U.S. 648 (1953). Appendix C. p. 55. See Notes of the Advisory Committee to Rule 17(a). Levinson vs. Deupree involved a libel action under admiralty law for wrongful death. The claim was tried in federal court based upon the Kentucky wrongful death statute. The plaintiff in Levinson had been appointed ancillary administrator of the estate of the decedent in Kenton County, Kentucky, but that appointment was held to be void because it was

filed in the wrong county. Thereafter, after the one year statute of limitations had run, plaintiff was appointed administrator in the proper county. The district court dismissed the case. On appeal the Sixth Circuit reversed and held that the one year period of limitations was only a Kentucky procedural rule for enforcing the cause of action and therefore was not binding in the federal forum. The Sixth Circuit stated, "[i]t is significant that the limitation held by the District Court to bar the action is not embodied in the substantive law which creates the right of action. The Kentucky death statute . . . contains no limitations . . . [Where a] statute that creates the right does not prescribe the period of limitation, the limitation as to time contained in a separate statute is not to be treated as a part of the right." Deupree vs. Levinson, 186 F.2d 297, 302 (6th Cir. 1950).

This Court in Levinson vs. Deupree, 345 U.S. 648 (1953) affirmed the Sixth Circuit on a subsequent appeal in the case. In the course of its opinion, the Court explicitly recognized the importance of the fact the time limitation period in question was not a part of the substantive cause of action sued upon. The Court stated:

> As we held in Garcia, a time limitation deemed attached to the right of action created by the state is binding in the federal forum.
>
> * * *
>
> . . . [i]t is clear that we are not dealing with an integral part of the right created by Kentucky. 345 U.S. at 651 and 652.

In this case there is no question but that the two year limitation period contained in § 6-5-410(d) is "an integral part of the right created by [Alabama]." Downtown Nursing Home, Inc. vs. Pool, supra; Nicholson vs. Lockwood Greene Engineers, Inc., supra. Petitioner

submits that the scope of Rule 17(a) was never intended to encompass those situations where a substantive rule of state law would be displaced. The authority upon which the 1966 amendments to Rule 17(a) was based, Levinson vs. Deupree, supra, carefully excluded from its consideration those circumstances where, such as the present case, the expired time limitation period in question is an "integral part" of the right of action sued upon. In addition, petitioner submits that the above construction of Rule 17(a) is the proper one for the further reason that should Rule 17(a) be construed so as to allow the displacement of a substantive rule of state law, such would violate the limitations prescribed for the Federal Rules of Civil Procedure in the Rules Enabling Act, 28 U.S.C. § 2072, see discussion below.

The construction of Rule 17(a) adopted by the Eleventh Circuit in this case which

permits the displacement of a substantive rule of Alabama state law is either beyond that intended for the scope of Rule 17(a), (see discussion, supra, pp. 21-25) or, if a correct construction squarely places Rule 17(a) beyond the scope of the Rules Enabling Act. The Rules Enabling Act, whcih is codified in 28 U.S.C § 2072, provides, in pertinent part, as follows:

> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeal of the United States in civil actions. . .
>
> Such rules shall not abridge, enlarge or modify any substantive right. . .

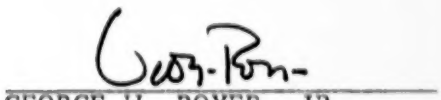
The state law time limiation period involved in this case is indisputably a substantive rule of state law. It is mot merely a separate general statute of limitations created by state law; rather, it is contained in and is a part of the substantive right of action itself, Downtown Nursing Home, Inc. vs. Pool, supra;

Nicholson vs. Lockwood Greene Engineers, Inc., supra. Alabama cases considering the two year limitation period set forth in § 6-5-410(d) clearly demonstrate its substantive nature. It cannot be tolled, Nicholson vs. Lockwood Greene Engineers, Inc., supra, and if suit is not brought according to its terms within the prescribed period, there can be no "relation back", Downtown Nursing Home, Inc. vs. Pool, supra. As such is the case, it is clear that the Court of Appeals erred in disregarding its terms. Either the scope of Rule 17(a) is not as broad as perceived by the Court of Appeals and thus Rule 17(a) does not apply in circumstances where expired time limitation period is a substantive part of the right of action, Cf. Walker vs. Armco Steel Corp., 446 U.S. 740, 747-48, (1980) or it is squarely contrary to the express terms of the Rules Enabling Act.

CONCLUSION

Because this case presents an important question concerning the conduct of actions in federal courts under the Civil Rights Acts and of a conflict between a federal statute and the Federal Rules of Civil Procedure this Court should grant certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, George W. Royer, Jr., a member of the Bar of the Supreme Court of the United States do hereby certify that on this the 28 day of January, 1983, I did serve copies of this Petition and the accompanying Appendices on respondent and upon all other parties separtely represented, by placing in the United States Mail, first class postage prepaid, three copies properly addressed to the following counsel of record:

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I further certify that I have served all parties required to be served.

GEORGE W. ROYER, JR.

TABLE OF APPENDICES

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CAROLYN N. HESS, Administratrix of the Estate of David Milano, Deceased, and as widow of David Milano, Deceased	)	
Plaintiff,	)	
-v-	)	C.A. CV80-PT-5275-NE
BOB EDDY, et al.,	)	
Defendants,	)	

ORDER

In accordance with a contemporaneously entered memorandum opinion, defendants' Motions for Summary Judgment are GRANTED, and this cause and action are DISMISSED with prejudice.

DONE and ORDERED this 29th day of June, 1981.

/s/ Robert B. Propst
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CAROLYN N. HESS, Administratrix of the Estate of David Milano, Deceased, and as widow of David Milano, Deceased	)	
Plaintiff,	)	
v.	)	C.A. CV80-PT-5275-NE
BOB EDDY, et al.,	)	
Defendants,	)	

MEMORANDUM OPINION

This is the second time this court has considered this case. On the first consideration, the court granted the motion to dismiss for failure to state a claim and gave leave to amend. At that time the court did not address arguments, raised on motions for summary judgment, that the action is barred because of the failure of the plaintiff to qualify as administratrix within two years

after the death of plaintiff's intestate.

There is no dispute that plaintiff's intestate died on November 2, 1978. There is further no dispute that plaintiff commenced this action on October 31, 1980, but that plaintiff was not appointed as administratrix of the estate of David Milano, plaintiff's intestate, until February 12, 1981, more than two years after Mr. Milano's death for which damages are claimed in these proceedings.

Jurisdiction in this case is invoked pursuant to the provisions of 42 U.S.C. § 1983. Federal law does not cover the survival of civil rights actions under § 1983. Moor v. County of Alameda, 411 U.S. 693, 702 (1973). Federal law being deficient, we must turn to "[t]he common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Con-

stitution and laws of the United States . . . ." 42 U.S.C. § 1988. Brazier v. Cherry, 293 F.2d 501 (5th Cir. 1961).

In Alabama a personal representative may commence an action to recover damages "for the wrongful act, omission or negligence of any person ...[s]uch action must be commenced within two years from and after the death of the testator or intestate." § 6-5-410, Code of Alabama 1975. The only other Alabama statute providing for recovery for wrongful death is § 6-5-391, Code of Alabama 1975. This statute, applying to the death of minors, is not here applicable. Section 6-2-38, Code of Alabama 1975 provides that, "An action by a representative to recover damages for wrongful act, omission or negligence causing the death of the decedent under Sections 6-5-391 and 6-5-410 must be commenced within two years from the death."

If Alabama law is strictly applied to this cause, there is no question that it is due to be dismissed. Strickland v. Mobile Towing and Wrecking Co., Inc., 293 Ala. 348, 303 So.2d 98 (1974); Downtown Nursing Home, Inc. v. Pool, 375 So.2d 465 (Ala. 1979).

In Strickland, supra, plaintiff filed suit under the provisions of the Jones Act, 46 U.S.C. § 688. The suit was filed by Strickland as administrator on March 11, 1968, after his intestate's death on March 12, 1965. Strickland was appointed administrator of the estate on March 13, 1968. The Alabama court held that the action was governed by 45 U.S.C. § 56, which provided in part: "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."

Saying that the three year limitation provision was a condition precedent to any right to bring the action, consistent with

with Alabama's construction of the time limit under § 6-5-410, Code of Alabama 1975, the Alabama Supreme Court held that any action purported to have been filed by the administrator prior to March 13, 1968 was a nullity and that being a nullity, there was nothing that any amendment could relate back to.

In Pool, supra, the original plaintiff filed suit on November 23, 1977 for the wrongful death of the intestate on November 24, 1976. No plaintiff was actually appointed administrator until February 5, 1979. The Supreme Court of Alabama held that:

> "In the present case, Johnnie F. Parker filed suit without having been appointed executor or administrator. Since he did not qualify under § 6-5-410 as a personal representative this suit was a nullity. Therefore, the doctrine of relation back, found in Rule 15(c) ARCP, does not apply."

375 So.2d at 466.

Plaintiff in this case seems to recognize that an application of Alabama law

pursuant to 42 U.S.C. § 1988 would defeat her action and that the cause would be due to be dismissed. Plaintiff argues, however, for the application of a law consistent with the intents and purposes of 42 U.S.C. § 1983 or perhaps even a higher law. The zealous argument of plaintiff has caused this court to give considerable consideration to the applicable law.

The court recognizes the broad remedial intents and purposes behind § 1983, and that it is to be liberally interpreted and applied with a sweep as broad as its language. Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) However, this court is also of the opinion that all laws must be applied with a degree of certainty, and not by virtue of a judge's whim or caprice. Otherwise "government of laws" will become "government of men."

In seeking guidance in this case, the court has looked primarily to Robertson v.

Wegmann, 436 U.S. 584 (1978) and Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961).

In Robertson, supra, Justice Marshall discussed many of the principles referred to above in an opinion concurred in by a majority of the Court. In that case, the court determined, in considering Louisiana survival statutes, that a § 1983 action did not survive the death of the injured party. Louisiana law having provided for survival in most actions, the Supreme Court held that, "Despite the broad sweep of § 1983, we can find nothing in the statute or its underlying policies to indicate that a state law causing abatement of a particular action should invariably be ignored in favor of absolute survivorship." 436 U.S. at 590.

The court further says:

> "That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of

> the state law to which § 1988 refers us. A state statute cannot be considered inconsistent with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby."

436 U.S. at 593.

Robertson, supra, does indicate that it intimates "no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." 432 U.S. at 594. However, this case is not a case where there was a total abatement of a death action, and this court is convinced that the general principles of Robertson, supra, are applicable here. They are particularly applicable to

plaintiff's policy arguments with regard to § 1983.

Plaintiff argues that the limitation under Alabama law is substantive rather than procedural, and that federal law should apply. Obviously, we start out with the premise that federal law applies, but federal law directs us back to currently effective state law on the general right of survival. Brazier v. Cherry, supra. In Brazier, supra, the court said:

> "Consequently, it does not really matter whether in the eyes of the local law the local statute, rule or decision thus incorporated by reference is in the category of substance, or procedure, or mixed. Congress adopts the whole 'common law, as modified and changed by the Constitution and statutes of the State' without regard to its technical local characterization."

293 F.2d at 409. Also see Footnote 20 on page 409.

Plaintiff argues that F.R.Civ.P. 17 governs and that the court should allow an

amendment so that the suit can be brought in the name of the real party in interest. The problem with this is that the "real party in interest" did not exist within the two year limitation period.

In Pollard v. United States, (M.D. Ala. 1974), (a § 1983 action), the plaintiffs argued "[t]his Court should adopt the state limitation provision only if it would assist plaintiff and should disregard it if its effect would be to bar an otherwise meritorious claim because of lapse of time." Chief Judge Johnson stated that "such a construction of 42 U.S.C. § 1988 would be contrary to the well-settled practice of adopting applicable state limitation periods and would lead to the anomalous result in many cases of there being no limitation period within which such federal claims must be pursued."

Plaintiff also argues that under Alabama law the personal representative, in bringing

wrongful death actions, is not seeking to benefit the deceased's estate, but is acting as an agent for certain designated beneficiaries. Plaintiff further argues that plaintiff is the sole beneficiary so designated and, for this reason, her independent claim as widow should remain notwithstanding her status as personal representative. Assuming, arguendo, that plaintiff, individually, has an independent claim, her individual claim, not being that of a personal representative, would not be governed by the same statute of limitations as is a wrongful death action under Alabama law. Any individual claim of plaintiff for her own interest under § 1983 would be governed by Section 6-2-39(5), Code of Alabama 1975. The following provision, which provides for a limitation of one year, of said statute would govern such a claim:

"Actions for any injury to the person or rights of another, not arising from contract and not herein specifically enumerated."

Thus any individual claim of plaintiff would have been barred after one year.

A similar case to this was decided by U. S. District Judge Hand of the Southern District of Alabama in Bracey v. Wallace, C. A. 76-133-H, decided November 30, 1976 (unreported). Judge Hand distinguished Dempree v. Levinson, 345 U.S. 648 (1953), on the basis that the two year limitation period prescribed in the Alabama wrongful death statute is of the essence of the action itself. Thus Judge Hand said, "[f]ailure to bring the action within the two year period prescribed by the Alabama wrongful death statute will bar both the right and the remedy." A copy of Judge Hand's opinion is attached.

The court ultimately concludes that:

(1) Alabama's policy of restricting

certain survivorship rights to personal representatives who bring actions within two years is not unreasonable;

(2) Alabama law governs in determining whether a personal representative has been appointed;

(3) Claimants who sue in Alabama for wrongful death under § 1983 for injury to their own interests (if such a claim is allowable) must commence suit within one year; and

(4) This court can borrow the applicable statute of limitations under §6-5-410, Code of Alabama 1975, only if the action is brought within two years by a duly appointed personal representative.

An order in accordance with this memorandum opinion will be contemporaneously entered.

This the 29th day of June, 1981.

/s/ Robert B. Propst
United States District Judge

APPENDIX C

CAROLYN N. HESS, Administratrix of the Estate of David Milano, deceased, Plaintiff-Appellee,

v.

BOB EDDY, et al., Defendants, Appellants,

No. 81-7634.

United States Court of Appeals, Eleventh Circuit.

Oct. 21, 1982.

Appeal from the United States District Court for the Northern District of Alabama.

Before HILL and HATCHETT, Circuit Judges, and GOLDBERG*, Senior Circuit Judge.

GOLDBERG, Circuit Judge:

In this appeal, we are asked to decide whether a civil rights action is time barred if a person other than the "real party in interest" brings suit within the applicable

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*Honorable Irving L. Goldberg, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

limitations period, and the real party in interest first joins and ratifies the action only after the limitations period has run. We conclude that the Federal Rules of Civil Procedure allow for an amendment or ratification by the real party in interest, that the amendment or ratification relates back to the time suit was initially filed, and that the real party in interest's action is therefore not time barred.

I. FACTS AND PROCEDURAL HISTORY

On November 2, 1978, an inmate in an Alabama county jail was brutally murdered by a fellow prisoner. On October 31, 1980, the victim's widow brought this civil rights damage action, alleging that her husband's death had been caused by the local prison officials' failure to provide safe and secure conditions of confinement. The plaintiff filed her civil rights damage action in U.S. District Court pursuant to 42 U.S.C. § 1983.

She brought suit in two capacities: as the victim's widow and as the administratrix of his estate. However, it was later determined that the plaintiff had not been appointed administratrix of her late husband's estate until some time after she had filed her action.[1] At that time, she amended her original complaint so as to reflect her new status as administratrix and to indicate her ratification of the initial filing of suit.

Unfortunately, the plaintiff's ex post facto ratification of the suit did not satisfy the defendants. They sought to dismiss her action, arguing that she could properly bring suit only after she had been appointed administratrix of her husband's estate, that

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[1]Although the plaintiff filed her petition for letters of administration with the local state probate court on October 31, 1980, she was not actually appointed as administratrix until three months later.

the two-year limitations period set forth in Alabama's wrongful death statute would apply in this § 1983 action, and that because she had been appointed administratrix after the two-year limitations period had run, her action was time barred. The district court took up the defendants' motion, held that the suit was indeed time barred, and dismissed the action. The plaintiff then brought this appeal.[2]

II. ANALYSIS

This appeal does not involve a pure question of limitations, for it is conceded that the complaint in this action was filed within the two-year limitations period.[3] The prob-

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[2]The plaintiff brought claims both as an individual and as administratrix of her late husband's estate. Eash of these claims was dismissed by the district court. The plaintiff now appeals from the dismissal of the claims brought in her representative capacity. She does not appeal from the judgment dismissing her individual claims.

[3]The decedent was killed on November 2, 1978. His widow brought suit on October 31, 1980, less than two years later.

lem here is that the "real party in interest" did not bring suit within the two-year limitations period.

The district court held that the only party who could properly bring this section 1983 action was the administratrix of the decedent's estate and that because the plaintiff was not yet the administratrix at the time she filed her complaint, the action had actually not been brought within the limitations period. Moreover, the district court held that the subsequent amendment of the complaint and its ratification by the real party in interest did not "relate back" to the initial filing of suit.

In finding that the subsequent amendment and ratification by the real party in interest did not relate back to the time of the initial filing, the district court relied upon Alabama state law which rejects the "relation back"

doctrine in wrongful death actions.[4] The district court held that Alabama's rejection of the "relation back" doctrine precluded its application in this case. With this we must disagree.

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[4]In the Alabama courts, a wrongful death suit brought by someone other than a duly appointed administratrix is void, and a subsequent amendment or ratification of the action by the real party in interest does not relate back to the time of initial filing. Downtown Nursing Home, Inc. v. Pool, 375 So.2d 465 (Ala. 1979); Strickland v. Mobile Towing & Wrecking Co., 293 Ala. 348, 303 So.2d 98 (1974). Thus, if amendment or ratification by the duly-appointed administratrix only occurs after the limitations period has run, the action is time barred. Downtown Nursing Home, Inc. v. Pool, supra; Strickland v. Mobile Towing & Wrecking Co., supra. In rejecting the "relation back" doctrine, Alabama represents a minority position among common law jurisdictions. See Annot. 3 A.L.R. 3d 1234 ("Running of Statute of Limitations As Affected by Doctrine of Relation Back of Appointment of Administratrix") However, it is not our place to comment upon the wisdom of Alabama's procedural rules. The sole question before us is whether the trial court acted properly in applying the Alabama rule in federal court.

In actions brought pursuant to 42 U.S.C. § 1983, federal courts may indeed apply rules of state law to questions as to which Congress has not provided clear guidance. Congress did not provide a statute of limitations for section 1983. Therefore, the district court correctly applied Alabama law to determine the applicable limitations period and properly held that the two-year limit set forth in Alabama's wrongful death statute would control in this case.[5] Similarly, Congress did not provide rules of survivorship for section 1983 actions. Therefore, the district court acted properly in

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[5]In civil rights damage actions brought pursuant to § 1983, a federal court must apply the most nearly analogous state statute of limitations. Board of Regents v. Tomanio, 446 U.S. 478, 100 S.Ct. 1790, 64 L.Ed.2d 440 (1980); Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); Rubin v. O'Koren, 644 F.2d 1023, 1025 (5th Cir. 1981). In this case, Alabama's wrongful death statute, Ala. Code § 6-5-410 (1977), provides for a two-year limitations period.

applying Alabama law to determine that the decedent's right of action survived his death and that the only party who could properly assert this claim would be the administratrix of his estate.[6] However, we find that the trial court erred in applying Alabama's "no relation back" rule in the face of a Federal Rule of Civil Procedure that expressly authorizes and adopts the "relation back" doctrine.

Rule 17(a) of the Federal Rules of Civil Procedure states that:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substi-

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[6] In a civil rights damage action brought pursuant to § 1983, rights of survivorship are to be determined according to state law. Robertson v. Wegmann, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978).

> tution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Fed. R. Civ. P. 17(a).

The plain language of the Rule clearly provides that when an action is brought by someone other than the real party in interest within the limitations period, and the real party in interest joins or ratifies the action after the limitations period has run, the amendment or ratification relates back to the time suit was originally filed and the action need not be dismissed as time barred.

Our interpretation of Rule 17(a) and its applicability in this context is supported by both the cases and the commentators. For example, in Levinson v. Deupree, 345 U.S. 648, 73 S.Ct. 914, 97 L.Ed. 1319 (1953), the Supreme Court held that where a wrongful death action is brought by a party not yet properly appointed as the administrator of the decedent's

estate, and where proper appointment occurs only after the applicable state limitations period has run, a federal court must allow the appointment to "relate back" to the time of initial filing-even though the forum state would not allow such a "relation back" and would hold the action time barred in its own courts.

Congress codified the rule of Levinson v. Deupree, supra, in its 1966 amendments to Rule 17(a)[7]. Since the promulgation of that revised Rule, commentators have consistently stated that the "Rule . . . restrict[s] dismissal and require[s] . . . relation back instead, overrid[ing] state practice to the contrary." 3A Moore's Federal Practice

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[7]The Notes of the Advisory Committee to Rule 17(a) state that the Rule is "intended to codify in broad terms the salutory principle of Levinson v. Deupree."

¶ 17.09, at 17-129 (2d ed. 1982) (emphasis added).

> [The] main thrust [of the 1966 Amendment to Rule 17(a)] is to allow a correction in parties after the statute of limitations has run, despite the valid objection that the original action was not brought by the real party in interest.

Id. ¶17.15, at 17-183.

> [T]here should be no problem finding that the federal court . . . may rely on Rule 17(a) to substitute the real party in interest, and to continue the action, even though the state law, under its statute of limitations, might not allow relation back and would require dismissal.

Id. at 17-183.

> [T]he failure to join the real party in interest at the commencement of the action does not require dismissal. Instead, the real party in interest can be joined or substituted and the action continued as it it had been instituted in his name.

6 C. Wright & A. Miller, Federal Practice and Procedure § 1541, at 637 (1971).

> [T]here is no longer any doubt that a federal court may apply the substitution and relation back provision of Rule 17(a) . . . even though the law of the state in which the court is sitting would not allow relief from the failure to bring suit in the name of the real party in interest and dismissal would be required under the applicable forum state's statute of limitations.

Id. § 1555, at 709.

> Finally, we note that the approach urged by these commentators has been consistently followed by the federal courts that have considered the question. See, e.g., Farbwerke Hoechst A.G. vs. M/V "Don Nicky", 589 F.2d 795, 797-798 (5th Cir. 1979) (suit need not be dismissed if real party in interest subsequently joins or ratifies action); Wadsworth v. United States Postal Service, 511 F.2d 64, 65-67 (7th Cir. 1975) (amendment to pleadings adding or substituting plaintiff as real party in interest relates back to filing of complaint); Crowder v. Gordons Transports, Inc., 387 F.2d 413, 415 (8th Cir. 1967) (state law did not allow relation back; however, "the issue of relation back is . . . controlled by

the Federal Rules."[8]

We therefore conclude that Rule 17(a) sets forth a rule of procedure that is to be applied in the federal courts. The rule provides that when an action is brought by someone other than the real party in interest, the suit need not be dismissed if the real party in interest subsequently joins or ratifies the action. The Rule further provides that such subsequent joinder or ratification by the real party in interest relates back to the time the suit was first filed. If the initial filing came within the applicable limitations period, the suit is not time barred. Most importantly,

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[8]See also, Motta v. Resource Shipping & Enter Co., 499 F.Supp. 1365, 1369, 1374 (S.D.N.Y. 1980); de Vries v. Weinstein Int'l Corp., 80 F.R.D. 452, 458-459 (D. Miss. 1978); Unilever Ltd. v. M/T Stolt Boel, 77 F.R.D. 384 (S.D.N.Y. 1977); James v. Nashville Bridge Co., 74 F.R.D. 595, 596-597 (N.D. Miss. 1977); Caldwell v. Metcalfe, 458 F.Supp. 847, 848 (E.D. Tenn. 1977); Honey v. George Hyman Const. Co., 63 F.R.D. 443 (D.D.C. 1974).

the Rule is to be applied even where the courts of the forum state have rejected the "relation back" doctrine. For this reason, we must conclude that the district court erred in applying Alabama law on the question of whether the doctrine of "relation back" would apply in this case. This is a federal civil rights action, brought in a federal court, and it is the Federal Rules of Civil Procedure that must apply.

III. CONCLUSION

The central question in this appeal is controlled by the clear language of the Federal Rules of Civil Procedure.

> These rules were designed in large part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits.

Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373, 86 S.Ct. 845, 851, 15 L.Ed.2d 807 (1966).

This action was brought within the applicable limitations period, and the real party in interest (the plaintiff acting qua administratrix) joined and ratified the action shortly thereafter. Rule 17(a) of the Federal Rules of Civil Procedure provides that joinder or ratification by the real party in interest relates back to the time of initial filing. Therefore, we conclude that this suit, now being pursued by the real party in interest, is not time barred. Accordingly, the judgment dismissing the plaintiff's action is REVERSED and this cause is REMANDED for further proceedings.

APPENDIX D

UNITED STATES COURT OF APPEALS

For The Eleventh Circuit

No. 81-7634

D. C. Docket No. CV 80-PT-5275-NE

CAROLYN N. HESS, Administratrix
of the Estate of David Milano,
Deceased,

Plaintiff-Appellant,

versus

BOB EDDY, ET AL.,

Defendants-Appellees.

Appeal from the United States
District Court for the

Northern District of Alabama

Before HILL and HATCHETT, Circuit Judges, and GOLDBERG*, Senior Circuit Judge.

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*Honorable Irving L. Goldberg, U.S. Circuit Judge for the Fifth Circuit, sitting by designation.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby REVERSED; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

October 21, 1982

ISSUED AS MANDATE:

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 81-7634

CAROLYN N. HESS, etc.,

Plaintiff-Appellant,

versus

BOB EDDY, et al.,

Defendants-Appellees.

Appeal from the United States
District Court for the

Northern District of Alabama

ON PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING EN BANC

(December 10, 1982)

Before HILL and HATCHETT, Circuit Judges,
and GOLDBERG*, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

*Irving L. Goldberg, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

Office-Supreme Court, U.S.
FILED
MAY 20 1983
ALEXANDER L. STEVAS,
CLERK

82-1282

NO. 82-1423

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

BOB EDDY, etc., et al.,

Petitioners,

v.

CAROLYN N. HESS, etc.,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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OTHER AUTHORITIES

6 Wright & Miller, Federal Practice and Procedure, sec. 1501, at pp. 523-524. 2

ARGUMENT

On October 21, 1982, the United States Court of Appeals for the Eleventh Circuit ruled that the Plaintiff's Complaint filed with the United States District Court for the Northern District of Alabama was improperly dismissed. The ruling was reversed and remanded.

The Court of Appeals took the proper action, and its ruling should stand.

The law of the State of Alabama is clear that the doctrine of relation back should bar the Defendants from successfully using the statute of limitations as a defense to the late qualification by the Plaintiff as Administrator of her deceased husband's estate. In Manning v. Zapata, 350 So.2d 1045 (1977), the Court of Civil Appeals of the State of Alabama reviewed an insurance subrogation case. The law suit

was filed within the period of the applicable one year statute of limitations, but 19 months after the accident the Plaintiff insurance company moved to amend the complaint by substituting one insurance company (the proper insurer) for another (the original party) as the real party in interest. The trial court allowed the amendment but ruled that it would not relate back to be effective within the one year period of the statute of limitations. The Court of Civil Appeals reversed the trial court, holding that the claim was not barred by the statute of limitations since no new cause of action was asserted. At page 1047, the Court quotes 6 Wright & Miller, Federal Practice and Procedure, sec. 1501, at pp. 523-524: ". . . As long as the Defendant is fully apprised of a claim arising from specified conduct and has prepared to defend the

action against him, his ability to protect himself will not be prejudicially affected if a new Plaintiff is added, and he should not be permitted to invoke a limitations defense. This seems particularly sound inasmuch as the court will require the scope of the amended pleading to stay within the ambit of the conduct, transaction, or occurrence set forth in the original pleading . . . . The courts seem to concentrate on these notice and indentity of interest factors as they do in the case of amendments changing defendants. Thus, an amendment substituting a new plaintiff has been held to relate back if the added plaintiff is the real party in interest . . ." At page 1047, the Court said that "identity of interest" between plaintiffs would exist where there was "a substantial relationship between the old and new parties with regard to the litigation, as well as a sufficiently

analogous legal position within the law suit to preclude the assertion of a new cause of action."

The Alabama Court of Civil Appeals spoke about the same question in Board of Water and Sewer Commissioners of the City of Mobile v. McDonald, 322 So.2d 717 (1975). In that case, the Plaintiff sued the Board for payment of money allegedly owed to the Plaintiff. After the applicable ten year period (statute of limitations) had expired, the Plaintiff's wife was substituted as the proper Plaintiff, when it was determined that she was actually the real party in interest. The Board argued that to allow this amendment and substitution of Plaintiffs to "relate back" would deny it the opportunity to assert the statute of limitations as a defense, but the Court of Civil Appeals said: "The purpose of the rules to effect justice upon the merits of the claim and to renounce technicality of procedure is markedly evident from the last two

sentences of Rule 15(b). These sentences are as follows:

> 'An amendment shall not be refused under subdivision (a) and (b) of this rule solely because it adds a claim or defense, changes a claim or defense, or works a complete change in parties. The court is to be liberal in granting permission to amend when justice so requires.'"

At page 721, the Court said, "An amendment changing parties plaintiff relates back if the claim of the new party arose out of the same transaction, conduct, or occurrence as that set forth in the original pleading, and if the defendant, within the period provided by law for commencing the action against him (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the substituted or joined party would have brought the action against

him." The trial court's decision in allowing the amendment to relate back was affirmed.

The Supreme Court of Alabama discussed relation back in Birmingham Gas Co. v. Sanford, 145 So. 485 (1932). In that case, a one year statute of limitations was involved, and the Plaintiff's wife was added as a party Plaintiff after the expiration of the appropriate one year period. The Defendant raised the limitation defense, but the Supreme Court affirmed the trial court's action in allowing an amendment. At page 488, the Supreme Court of Alabama said, "Our own court, in the earliest history of the amendment statutes, both at law and in equity, took the position that these statutes were intended to accomplish just and salutory purposes, to discourage technical objections, and to secure a trial on the merits of each controversy; and to that end, we have uniformly held that our amendment statute should be liberally construed."

The Supreme Court then recognized that the amendment which added the Wife did not state a new cause of action but that the identical cause of action existed after the amendment, and, therefore, the amendment should relate back to the commencement of the suit.

The Defendants in the case now before the Court rely for their authority almost exclusively upon the case of Downtown Nursing Home, Inc. v. Poole, 375 So.2d 465 (1979). In the Nursing Home case, one person sought qualification as administrator of the deceased's estate, but was not actually qualified as administrator before the statute of limitations expired. After the law suit was filed and after the limitations period had expired, a second person asked to be qualified and was actually appointed as the personal representative of the deceased. The original filer of the suit was not qualified.

It is submitted that the Nursing Home case is not "on all fours" with the case now

being argued; in the instant case, the Plaintiff did ultimately receive her qualification as personal representative, and there was a base established prior to the expiration of the limitation period to which an amendment could relate (in the Nursing Home case there was no such opportunity for the doctrine of relation back to occur since the original filer of the suit was not the person who was qualified as the real party in interest); the Nursing Home case alleged a cause of action based entirely upon state law, and 42 U.S.C.A. sec. 1983 and 1988, along with their underlying historical direction, were not involved.

In the article "Running of Statute of Limitations as Affected by Doctrine of Relation Back of Appointment of Administrator" 3 ALR3rd 1234, it is stated that "In the great majority of cases that have considered the doctrine of relation back of the appointment of an administrator as it might affect

the running of the statute of limitations, it has been held that such an appointment made after the statute has run against a claim will relate back to validate actions taken on the claim within the statutory period by the person subsequently appointed administrator, thus barring reliance upon the defense of limitations by the party against whom the claim is asserted on behalf of the estate. Such result has been reached in wrongful death actions as well as in other types of actions."

In summary, the Supreme Court of the United States should refuse to grant certiorari for the following reasons:

A. The Court of Appeals acted properly.

B. There was proper application of the doctrine of relation back; the facts in this case are different, not "on all fours," with the facts in the Nursing Home case.

C. The granting of certiorari would serve to recognize a bare technical defect, the failure to obtain qualification for the Plaintiff as personal representative of her husband's estate, prior to the filing of the

law suit concerned. This defect would not exist if my father had not unexpectedly died of a sudden heart attack a matter of hours prior to the time when the law suit was filed.

D. The reason for the defect gives the Court occasion to speak about the future of our profession. Should opportunist attorneys be able to thwart the interests of justice by exploiting another attorney's personal tragedy, or should the courts recognize that the continuing evolution of our theories of justice require that bare technical defects should be subordinated to the interests of deciding claims upon their factual merits, regardless of the presence of insignificant technical defects which bear no relation to "guilt" or "innocence?"

E. The Defendants will not be prejudiced, because their attorneys, by their own admissions, had kept a file on the case from the date when the claim arose until the date when the law suit was filed. This is not a "stale claim" which the Defendants are unprepared to defend.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been served upon each attorney of record for all parties in this case by placing a copy of same in the United States Mail, properly addressed and postage prepaid, this the 19th day of May, 1983.

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No. 82-1282

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

BOB EDDY, etc., et al.,

Petitioners,

v.

CAROLYN N. HESS, etc.,

Respondent

ON PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Reply to Response of Respondent
to Petition for Writ of Certiorari

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REPLY TO RESPONSE OF RESPONDENT
TO PETITION FOR WRIT OF CERTIORARI

On May 12, 1983, Respondent served a response to the Petition for Writ of Certiorari filed in this case as requested by the Clerk of this Court on April 6, 1983. The response dealt solely with a contention by Respondent that "relation back" of the qualification of Respondent as administratrix of the estate of David Milano was permissible under Alabama law. The response to the Petition for Writ of Certiorari wholly misstated Alabama law on this issue.

The Alabama statute applicable to this action under 42 U.S.C. Section 1988 is the Alabama Wrongful Death Statute, Section 6-5-410, Code of Alabama, 1975. None of the cases cited by Respondent in her response were brought under the Wrongful Death Statute. The rule that there can be no "relation back" nor tolling of the time limitation period contained in the Alabama Wrongful Death Statute is unique to wrongful death actions in Alabama and does not apply to other

types of actions brought under Alabama law. The uniqueness of the rule lies in the nature of the time period contained in the Wrongful Death Statute in Section 6-5-410(d). The two year time period contained in Section 6-5-410(d), Code of Alabama, 1975 is not a statute of limitations. McMickens vs. Waldrop, 406 So.2d 867 (Ala. 1981); Downtown Nursing Home vs. Pool, 375 So.2d 465 (1979), cert den., 445 U.S. 930 (1980); Nicholson vs. Lockwood Greene Engineers, Inc., 278 Ala. 497, 179 So.2d 76 (1965). Instead, the two year period contained in the statute is a part of the substantive cause of action itself. As the Alabama Supreme Court recently stated in McMickens vs. Waldrop, supra:

> The law of Alabama for many years has been that the two year period provided for in the Wrongful Death Statute is a part of the substantive cause of action and is not to be treated as a statute of limitations . . . 406 So.2d at 869.

The significance of the distinction is that the two year period in Section 6-5-410 is not, as are statutes of limitations, merely a limitation on the exercise of the remedy. Instead,

the two year time period, being a part of the substantive cause of action itself, is a part of the remedy itself and, after two years, the remedy expires. The distinction was clearly pointed out by the Supreme Court of Alabama in the case of Nicholson vs. Lockwood Greene Engineers, Inc., supra. In that case, the Supreme Court of Alabama was presented with an argument that under the Alabama statute tolling statutes of limitations applicable to claims of minors during the period of their minority[1] the two year time period contained in Section 6-5-410(d) was tolled in wrongful death actions during the period of the minority of a minor wrongful death plaintiff. In rejecting this argument, the Alabama Supreme Court held that because the two year time period in Section 6-5-410(d) is a substantive element of the cause of action itself which simply expires after two years, the limitation period cannot be tolled:

---

1 Section 6-2-8, Code of Alabama, 1975

Such action, when brought, must be deemed to arise under the wrongful death statute, [now codified as Section 6-5-410(d), Code of Alabama, 1975] for there can be only one action for wrongful death (citation omitted).

The last sentence of Section 123, supra, reads:

> "Such action must be brought within two years from and after the death of the testator or intestate."

In Louisville and N.R.R. Co. v. Chamblee, 171 Ala. 188, 54 So. 681, it is stated:

> "This period of two years is of the essence of the newly by the statute conferred right of action, and the plaintiff has the burden of affirmatively showing that his action was commenced within the period provided. It is not a limitation against the exercise of the remedy only." (emphasis original).

In Parker v. Fies and Sons, 243 Ala. 348, 10 So.2d 13, it is stated that the two year period provided in the wrongful death statute within which a wrongful death action must be brought "is not a statute of limitations, but of the essence of the cause of action, to be disclosed by averment and proof."

Counsel for appellants, plaintiffs below, argue that because of the provisions of Section 36, Title 7, Code of Alabama, 1940, (now Section 6-2-8, Code of Alabama, 1975) the appellant minors should be given the period allowed by law for the bringing of their action after the termination of their disability of nonage.

The fallacy of this argument is that Section 36, supra, relates to statutes of limitation, and not to actions, such as the present one, where the time within which the statutorily created cause of action is fixed in the act creating the right, and is of the essence of the right.

In the absence of a saving clause, expressed or implied, in a wrongful death act creating an otherwise non-existing cause of action, it seems to have been the unanimous view of the courts of our sister states that minority of the plaintiff is not tolled by virtue of the provisions relating to general statutes of limitations wherein such minority does toll the operation of a pure statute of limitations. This for the reason that the time provision within which a wrongful death act is of the essence of the action, and also, such limitation affects the liability itself, and not merely the remedy. (citations omitted).

Because the time period contained in the Wrongful Death Statute is a part of the claim itself, if a wrongful death action is commenced

in Alabama prior to the expiration of the two year period following the death of the decedent by one who is not the "personal representative" of the estate of the decedent, subsequent appointment of the plaintiff as the personal representative following expiration of the two year period does not "relate back" to the commencement of the action. The Alabama Supreme Court has squarely decided this issue in a recent case almost identical to the instant case.

In Downtown Nursing Home, Inc. vs. Pool, 375 So.2d 465 (Ala. 1979), cert. denied, 445 U. S. 930 (1980) an action was brought for wrongful death under § 6-5-410. Suit was filed by the son of the decedent one day short of the expiration of two years from the decedent's death. The plaintiff had, however, never been appointed the executor or administrator of the decedent's estate. An administrator of the decedent's estate was not appointed until almost two and one-half months after the action was brought and well beyond the two year period following the death of the decedent. The

plaintiff in Pool sought to amend the complaint to substitute the administrator as party plaintiff. The trial court allowed the amendment. On appeal the Supreme Court of Alabama reversed. The Alabama Supreme Court held that the wrongful death action was "a nullity" and due to be dismissed because no action had been brought by the personal representative of the estate within two years of the decedent's death. The Court stated as follows:

> Our wrongful death statute, Code 1975, § 6-5-410, in pertinent part provides that:
>
> > (a) A personal representative may commence an action . . . .
> >
> > (d) Such action must be commenced within two years from and after the death of the testator or intestate.
>
> * * *
>
> The statute requires that the action must be brought within two years after the death of the testator or intestate. This two year period is part of the substantive cause of action and is not to be treated as a statute of limitations. The two year period is not a limitation against the remedy only because after two years the remedy expires.

(citations omitted).

* * *

> This Court held that any action by the administrator occurring prior to his appointment was a nullity and therefore there was nothing to which an amendment could relate back.
>
> In the present case, Johnnie E. Parker filed suit without having been appointed executor or administrator. Since he did not qualify under § 6-5-410 as a personal representative this suit was a nullity. Therefore, the doctrine of relation back, found in Rule 15(c), ARCP, does not apply. 375 So.2d at 466.

The Alabama authorities cited by Respondent in her response to the Petition for Certiorari are wholly inapplicable. The time limitation periods at issue in those cases are mere statutes of limitations only. As shown above, Alabama law is clear that there can be no "tolling" of the substantive time period contained in Section 6-5-410(d) pending the appointment of a personal representative of the estate of a decedent and is equally clear that there can be no "relation back" of the tardy appointment of a personal representative following expiration of the

of the two year period contained in Section 6-5-410(d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George W. Royer, Jr., a member of the Bar of the Supreme Court of the United States do hereby certify that on this the 20 day of May, 1983, I did serve copies of this Reply to the Response to the Petition of Certiorari on respondent and upon all other parties separately represented, by placing in the United States Mail, first class postage prepaid, three copies properly addressed to the following counsel of record:

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I further certify that I have served all parties required to be served.

GEORGE W. ROYER, JR.